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**UNITED STATES DISTRICT COURT
DISTRICT OF GUAM**

THE GOVERNMENT OF GUAM, by and
through the ATTORNEY GENERAL OF
GUAM,

Plaintiff,

vs.

FELIX P. CAMACHO, in his official capacity
as the Governor of Guam,

Defendant.

Civil Action Case No. 04-00035

**AMENDED
MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTIVE RELIEF**

ORIGINAL

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**AMENDED
MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTIVE RELIEF**

Plaintiff Government of Guam has moved the Court for an Order setting date for a hearing on plaintiff's Motion for Preliminary Injunctive Relief seeking the following relief:

1. That the Court issue a judgment declaring that defendant Governor Felix P. Camacho is usurping, intruding, and unlawfully holding and exercising the functions, powers and duties of the Office of Attorney General; and ordering defendant Governor Felix P. Camacho enjoined and restrained him from exercising the powers and duties of said office;

- 1 2. That the Court issue a declaratory judgment that the appointment or attempted
2 appointment of a “special prosecutor,” however denominated, by the Governor is
3 an impermissible violation of the doctrine of separation of powers, and in
4 particular, a violation of the powers and duties of the Office of Attorney General
5 as “chief legal officer” of the Government of Guam, and thereby violates the
6 Organic Act of Guam, 48 U.S.C. § 1421; and
7
8 3. That the Court issue a preliminary injunction enjoining the Governor, his
9 successors, agents, employees, and all persons acting in concert with him from
10 exercising or attempting to exercise any of the powers and duties of the Office of
11 Attorney General by, *inter alia*, exercising any authority with respect to the
12 investigation and/or prosecution of suspected crimes or criminal activity within
13 the Territory of Guam, said authority being entirely within the powers and
14 duties exclusively reserved to the Attorney General as Chief Legal Officer by
15 Congress; or by appointing or attempting to appoint a “special prosecutor,”
16 however denominated, to investigate and prosecute allegations of criminal
17 wrongdoing within the Territory of Guam.

18 **Applicability of the Writ of *Quo Warranto***

19 “An action in *quo warranto* is an extraordinary proceeding, addressed to preventing a
20 continued exercise of authority unlawfully asserted.” *State ex rel. Woods v. Block*, 189 Ariz.
21 269, 272, 942 P.2d 428, 431 (1997). “Historically *quo warranto* was ‘the prerogative writ by
22 which the government (could) call upon any person to show by what warrant he holds a public
23 office or exercise a public franchise.’ *Newman v. United States ex rel. Frizzell*, 238 U.S. 537,
24 545-546, 35 S.Ct. 881, 883, 59 L.Ed. 1446 (1915); *Wirtz v. National Maritime Union of*
25

1 *America*, 399 F.2d 544, 548 (2nd Cir. 1968).” *United States v. Machado*, 306 F.Supp. 995, 998
2 (N.D.Cal. 1969). “*Quo warranto* lies to prevent the usurpation of an office.” *Buckner v. Veuve*,
3 63 Cal. 304, 1883 WL 1445 (Cal. 1883). “The writ or order need not recite the facts showing
4 that the petitioner is entitled to it, and is in the nature of a summons commanding the
5 respondent to show by what authority he claims to hold the office, and, in effect, is an order to
6 show cause.” *In the matter of the application of David K. Sherwood*, 22 Haw. 385, 1914 WL
7 1757 (Sup. Ct. Hawaii. Terr. 1914). “The definition of this process is, that it is in the nature of
8 a writ of right of the public against him who usurps any office, franchise, or liberty; to inquire
9 by what authority he supports his claim, in order to determine his right.” *People ex rel. Palmer*
10 *v. Woodbury*, 14 Cal. 43, 46 1859 1129 (Cal. 1858).

12 Notice pleading is all that is required. The courts have held that “a complaint which
13 pleaded in general terms that defendant was ‘usurping, intruding into, and unlawfully holding
14 and exercising the office of Supervisor * * *’ was sufficient.” *People ex rel. Smith v. City of*
15 *San Jose*, 100 Cal.App.2d 57, 59, 222 P.2d 947, 949 (1950) (editorial ellipsis in original);
16 *People ex rel. Palmer, supra* (“The allegations of the complaint sufficiently show that the
17 defendant is in possession of the place, and this without lawful authority, and this we take to be
18 a sufficient allegation of intrusion and usurpation.”).

19 And, in *quo warranto* proceedings, the burden of proof is reversed. “The ordinary rule
20 in civil actions which imposes the burden upon the plaintiff to allege and prove his title does
21 not apply in a *quo warranto* proceeding, the object of which is to require the occupant of a
22 public office to show by what right or authority he holds and exercises the same; and, if he fails
23 to show a complete title to it, judgment must go against him.” *State ex rel. Carter v. Stevens*,
24 29 Or. 464, 472, 44 P. 898, 899 (1896); accord, *People ex rel. Smith v. City of San Jose, supra*.
25

1 Accordingly, the burden is on the defendant to show by what right he holds title to the office of
2 “special prosecutor.”

3 The District Court of Guam, Appellate Division, has previously recognized that while
4 there is no statutory provision for the writ of *quo warranto*, the common law writ is available, if
5 instituted by the government. *Territorial Prosecutor for the Territory of Guam v. Superior*
6 *Court of Guam*, 1983 WL 30224 (D.Guam A.D. 1983) (citing *U.S. v. Machado, supra*). Finally,
7 the Federal Rules of Civil Procedure govern the conduct of the action as the writ is expressly
8 provided for in the rules. *See* Fed.R.Civ.P.,81(a)(2).
9

10 11 **THE ORGANIC ACT POWERS OF THE GOVERNOR** 12 **AND THE ATTORNEY GENERAL**

13 **The Governor Has No Authority to Investigate Allegations of Criminal Wrongdoing or** 14 **to Appoint a “Special Prosecutor”**

15 The “Organic Act of Guam,” 48 U.S.C. § 1421 *et seq.*, functions as Guam's constitution.
16 *See Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980); *Haeuser v. Dept. of Law*, 97 F.3d
17 1152, 1156 (9th Cir. 1996); *see generally, In re: Request of Governor Felix P. Camacho*
18 *Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam*,
19 2004 Guam 10, ¶¶ 19-32 (Guam Sup. Ct. June 11, 2004). The complaint in *quo warranto* and
20 the declaratory judgment is intended to clarify and delimit the executive powers of the Governor
21 of Guam to the extent the exercise of those powers is in conflict with the powers and duties of
22 the Office of Attorney General, the “chief legal officer of the government of Guam” under the
23 Organic Act of Guam. *See* 48 U.S.C. § 1421 *et seq.* The section of the Organic Act pertinent to
24 the discussion here that addresses the Governor’s power while seemingly quite broad, is still
25 very specific and defined.

1 The Governor shall have general supervision and control
2 of all the departments, bureaus, agencies, and other
3 instrumentalities of the executive branch of the government of
4 Guam. He may grant pardons and reprieves and remit fines and
5 forfeitures for offenses against local laws. He may veto any
6 legislation as provided in this chapter. *He shall appoint, and may*
7 *remove, all officers and employees of the executive branch of the*
8 *government of Guam, except as otherwise provided in this or any*
9 *other Act of Congress, or under the laws of Guam, and shall*
10 *commission all officers that he may be authorized to appoint.* He
11 shall be responsible for the faithful execution of the laws of Guam
12 and the laws of the United States applicable in Guam.

13 48 U.S.C. § 1422 (emphasis added).¹

14 With respect to the Governor's purported authority to appoint a "special prosecutor" or
15 otherwise exercise investigative and prosecutorial functions, the Act is particularly specific with
16 respect to the Governor's appointment powers, which refers to all officers and employees of the
17

18 ¹ The Governor doubtless intends to argue that as he is "responsible for the faithful execution of the laws of Guam
19 and the laws of the United States applicable in Guam," *see* 48 U.S.C. § 1422, *and see* Complaint, Exhibit 1, he is
20 perforce authorized not merely to appoint someone to the office of special prosecutor, but, by necessity, to establish
21 the office itself (as it is nowhere else provided for by law). Prior to the 1998 amendments to the Organic Act which
22 removed the Office of Attorney General from the Governor's appointment authority, it may have been true, and, in
23 fact, that may very well have been the practice historically. But the 1998 amendments to the Organic Act
24 establishing the organically independent Office of Attorney General as "chief legal officer" changed all that. For
25 that reason, reliance on historical practice or reference to the cases the Governor will likely cite which pre-date the
Organic Act amendments, *see, e.g., People v. Camacho*, 1 Guam rep. 501 (1975), and *Government of Guam v.*
United States, Civ. No. 82-0001 (D.C. Guam August 3, 1982), are inapposite, for they fail to take into
consideration the significant structural changes to the balance of powers within the Government of Guam. Indeed,
if anything, in light of the 1998 amendments to the Organic Act, a close reading of those cases supports the
Attorney General's argument, not the Governor's, for those cases held it was a violation of the doctrine of
separation of powers for the Legislature to abrogate the Governor's then-authority to appoint and remove the
Attorney General. The Governor does not have that authority any longer, not since the election of Guam's first
organically established Attorney General and "chief legal officer." Further, the Governor's reference in Exhibit 1 to
People v. Moylan, Superior Court of Guam Case No. CM0864-03, "Decision and Order" dated January 23, 2004 as
support for the argument that he has authority to appoint special prosecutors is simply wrong. That decision did not
address the Governor's Organic Act authority, but merely denied a motion to disqualify a particular prosecutor and
dismiss the complaint based upon allegations of conflict of interest. It is a limited decision that in no way stands for
the Governor's assertion that he can unilaterally invade the province of the Office of Attorney General and appoint
special prosecutors. Accordingly, unless the Governor intends to invoke his power to declare martial law in support
of his argument that he can create an office out of thin air not otherwise authorized by Congress in the Organic Act,
the Governor is not merely invading the province of the Attorney General with his intended appointment, but is
invading the province of Congress and the Legislature of Guam as well. In short, before attempting to appoint
anyone to the office of "special prosecutor," the Governor must first disregard the separation of powers doctrine,
assume the legislative mantle of Congress, and "legislate" the office of "special prosecutor" into existence all by
himself. This, he clearly has no authority to do.

1 executive branch “that he may be authorized to appoint.” There is nothing in the Organic Act or the
2 laws of Guam that authorizes the Governor to appoint a special prosecutor because, among other
3 reasons, there is no such office authorized by the Organic Act or otherwise by the Legislature of
4 Guam. Since the Organic Act is very clear concerning the powers of the governor, one cannot read
5 into the Governor’s powers an implied authority to create offices out of whole cloth, or to make an
6 appointment to an office that does not exist. The statute compels one to read it by its terms and
7 nothing more. When it comes to the appointment power, it specifically states the Governor “shall
8 commission all officers *that he may be authorized to appoint.*” *Id.* (emphasis added). There is no
9 authority to appoint someone to a nonexistent office.
10

11 The Organic Act is very specific concerning the separation of powers. “The government
12 of Guam shall consist of three branches, Executive, Legislative and Judicial.” 48 U.S.C. §
13 1421a. In *People of the Territory of Guam v. Camacho*, 1 Guam Rep. 501 (Sup. Ct. Guam
14 1975), the Supreme Court held invalid under the separation of powers doctrine of the Organic
15 Act a local statute that authorized the appointment of a special prosecutor by the judiciary. In
16 the case at bar, there is, of course, no local law authorizing the Governor to appoint anyone to
17 the office, so this Court may never even reach the separation of powers issue. And although
18 *Camacho* was decided over 20 years ago, at a time when the Governor appointed the Attorney
19 General, the point to note is that there has been no effort by Congress or the Guam Legislature
20 since *Camacho* to authorize the Governor to establish the office of “special prosecutor,” let
21 alone appoint anyone to fill it.
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23 What has happened in the interim since *Camacho* was decided were Congressional
24 amendments to the Organic Act in 1998. At that time, Congress fundamentally changed the
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1 nature of the Office of the Attorney General, “organically” establishing the position as the
2 “Chief Legal Officer” of the Government of Guam, 48 U.S.C. § 1421g(d)(1), and giving the
3 Guam Legislature the option to provide that the Attorney General may be elected, 48 U.S.C. §
4 1421g(d)(2). The purpose of the Congressional amendments establishing the Office in the
5 Organic Act and the subsequent Guam legislative action providing that it shall be an elected
6 position was to remove the Attorney General from the sphere of political influence, specifically
7 to insulate the Office from the executive and legislative branches of the Guam government.
8 Congress’ intent was to “organically” establish the position, and the Guam Legislature’s intent
9 was to provide that the office holder would be elected rather than appointed as it had previously,
10 so that the office holder would be immune from political interference from other branches of
11 government.
12

13 In sum, plaintiff is seeking a Declaratory Judgment that affirms the common law duties
14 and powers of the Attorney General as “chief legal officer,” and delimits the Governor’s
15 authority to intrude upon or otherwise compromise the powers and duties of the Attorney
16 General as envisioned in the Organic Act. As the Governor has no independent Organic Act
17 authority to create the office of “special prosecutor,” he certainly has no authority to appoint
18 anyone to the position. And since the 1998 amendments to the Organic Act, whatever historical
19 practice may have been, he has no authority to investigate or oversee the prosecution of
20 allegations of criminal wrongdoing on Guam. That is reserved to the Attorney General alone.
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The Powers of the Attorney General in the Organic Act and at Common Law

Prior to 2002, with the election of the Guam's first Organic Act empowered Attorney General, the Attorney General was a cabinet position, appointed by the Governor of Guam. In 1998, the United States Congress amended the Organic Act to provide that there shall be an Attorney General of Guam who shall be the "chief legal officer of the government of Guam," 48 U.S.C. § 1421g(d)(1). By establishing the Office of the Attorney General in the Organic Act itself, and defining the holder of that office as "chief legal officer of the government of Guam," Congress intended to prevent the Legislature of Guam from diminishing, reducing or destroying those powers inherent in the office at common law.

The 1998 amendment further authorized the Guam Legislature to determine how this constitutional officer was to be selected, whether by election or appointment. 48 U.S.C. § 1421g(d)(2). In 1999, pursuant to Congressional authorization in the Organic Act as amended, the Legislature of Guam passed P.L. No. 25-44 providing that the Attorney General of Guam would be elected in the next gubernatorial election. Guam legislative history also reflects that it was the intent of the Legislature to insulate the Office of Attorney General from politics by declaring that the holder of the Office was to be elected, no longer appointed or to be removed by, or to serve at the pleasure of, the Governor.

The phrase "chief legal officer," is a legal term of art used by a select number of States. Guam's Organic Act provision arose after local law had already created and empowered an Office of the Attorney General, but nowhere in the Congressional record is there any evidence that the Legislature of Guam was still authorized to prescribe the powers and duties of the Attorney General under the Organic Act, or that the Governor retains any residual powers to appoint a "special prosecutor" as was true previously, when the Attorney General was appointed

1 by, and served at the pleasure, of the Governor.² And there is no evidence that Congress
2 intended to ratify pre-existing local law in this regard. Indeed, case law holds to the contrary.
3 *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989) (there is no implied ratification of prior inconsistent
4 local law by Congressional silence in amending the Organic Act). Accordingly, the Governor's
5 anticipated citations to cases which pre-date the Organic Act are unavailing. Since the 1998
6 amendments to the Organic Act, whatever authority the Governor held in the past to oversee the
7 investigation and prosecution of alleged criminal wrongdoing is just that, a thing of the past.

8 Congress intended to make Guam's Attorney General autonomous and independent, and
9 that intent is reflected in its deliberate choice of the term "chief legal officer." Courts in many
10 states recognize that the independence of the Attorney General reflects a conscious choice by
11 the framers of their constitutions to provide an additional check and balance in the traditional
12 tripartite scheme of government. *State v. Gattavara*, 47 P.2d 18 (Wash. 1935). The Attorney
13 General is the people's "watchdog." Guam's elected Attorney General offers what no other
14 elected or appointed official can bring to the government of Guam, uniformity, consistency and
15 a coherent legal policy for the government of Guam removed from the political control,
16 oversight and interference by the executive and legislative branches. Placing the legal affairs in
17 the hands of a single official, the Attorney General, and vesting in that Office the discretion to,
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19

20 ²By way of comparison, the case of *Territorial Prosecutor for the Territory of Guam v. Superior Court of Guam*,
21 1983 WL 30224 (D.Guam. A.D.) is instructive. In that case the U.S. District Court of Guam Appellate Division
22 held that a local act by the Guam Legislature creating a territorial prosecutor, the Territorial Prosecutor's Act,
23 setting forth limitations on the Governor's broad appointment and removal powers was "inconsistent with the
24 mandate of the Organic Act in that it impermissibly encroaches upon the Governor's removal powers under the
25 Organic Act. As noted by that court, "the legislature may not enact a law encroaching upon the Governor's
authority and powers which are mandated by the Organic Act.... [T]o permit the legislature to do so, not only
would [] render the concept of separation of powers meaningless, and be inconsistent with the mandate of the
Organic Act, but it could possibly result in the Governor being divested of his executive authority and power at the
whim of the legislature." *Id.* *5. Similarly, in the case at bar, without Organic Act authorization, neither the
Legislature nor the Governor may encroach upon the powers and duties of the Attorney General as "chief legal
officer." Else, it would render the term meaningless and could result in the Attorney General being divested of his
authority as chief legal officer at the whim of the Governor. That is precisely the controversy presented here.

1 *inter alia*, appear in certain proceedings affecting the legal interests of the government of Guam
2 creates uniformity, consistency and efficiency.

3 For an excellent discussion of the powers of the Attorney General at common law and
4 application of the Organic Act in view of the Attorney General's statutorily derived common
5 law powers, *see*, "Decision and Order," entered by then Superior Court of Guam Judge, now
6 United States Magistrate Judge Joaquin V. E. Manibusan, Jr. in *Moylan v. Camacho*, Special
7 Proceeding Case No. SP230-03, pp. 12 -37 (Superior Court of Guam Nov. 10, 2003). A true
8 and correct copy of Judge Manibusan's Decision and Order is attached for the convenience of
9 the Court. As "chief legal officer," the Attorney General is endowed with certain inherent
10 common law powers, which extend the Attorney General's powers and duties beyond those
11 created by statutory law. *See, e.g., State of Illinois v. Bristol-Myers Co.*, 470 F.2d 1276 (7th Cir.
12 1972). Indeed, in *Moylan v. Camacho, supra*, Guam Superior Court Judge Manibusan has
13 already held that it is "undisputed that an Attorney General possesses common law powers." *Id.*
14 at 20.

16 At common law, the powers of the Attorney General have been delineated as "to
17 institute, defend or intervene in any litigation or quasi-judicial administrative proceeding which
18 he determines in his sound official discretion involves a legal matter of compelling public
19 interest." *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976). In
20 states where the Office of Attorney General is constitutionally created, such as Illinois, the
21 Attorney General's powers are regarded as powers that could not be diminished by local
22 legislation. *American Legion Post No. 279 v. Barrett*, 20 N.E.2d 45, 51 (Ill. 1939) ("the General
23 Assembly may not take away from a constitutional officer the powers or duties given him by the
24

1 constitution”); *People ex rel. Castle v. Daniels*, 132 N.E.2d 507, 509 (Ill. 1956) (“the Attorney
2 General, whose office is created by the Illinois constitution, ... is the chief law officer of the
3 State and has those powers which resided in the Attorney General at common law ... and neither
4 the legislature nor the courts can deprive him of his constitutionally granted authority”);
5 *Department of Mental Health v. Coty*, 232 N.E.2d 686, 689 (Ill. 1967) (“the common-law
6 powers of the Attorney General were preserved to him by the constitution and while the General
7 Assembly can impose additional power and duties upon him, it cannot strip him of his common-
8 law powers”); *Gust K. Newberg, Inc. v. Illinois State Toll Highway Auth.*, 456 N.E.2d 50, 67
9 (Ill. 1983) (“while the legislature may add to his powers, it cannot reduce the Attorney
10 General’s common law authority in directing the legal affairs of the state”); *People ex rel.*
11 *Hartigan v. E. & E. Hauling, Inc.*, 607 N.E.2d 165, 170 (Ill. 1992) (“although the legislature
12 may add to the Attorney General’s common law powers, it may not detract from them”).

14 Accordingly, the Attorney General respectfully submits that in the absence of express
15 provisions in the law to the contrary, not only are those common law powers “inherent” in the
16 Office of the Attorney General, they are inalienable. *Cf. Bordallo v. Baldwin*, 624 F.2d 932, 934
17 (9th Cir. 1980) (Guam Legislature cannot lawfully reduce the governor’s functions with respect
18 to the governance of the Guam hospital to “mere ministerial function of validating appointments
19 made by others to Guam Hospital’s governing body” in derogation of the Governor’s ultimate
20 responsibility in the Organic Act for the governance of the hospital); *In re: Request of Governor*
21 *Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the*
22 *Organic Act of Guam*, 2004 Guam 10, ¶ 75 (noting instances wherein “the Legislature may limit
23 the Governor’s power by ‘otherwise provid[ing] ... under the laws of Guam.’ 48 U.S.C. §
24 1422.”) (editorial brackets in the original). These two cases involved attempted legislative
25

1 abrogation of the *Governor's* Organic Act powers, but the analysis is the same as applied to the
2 question presented here, namely: whether the Governor has the power or authority to abrogate
3 or otherwise diminish the common law powers of the Attorney General as "chief legal officer"
4 under the Organic Act who, himself, stands on equal constitutional footing as the Governor.
5 While the Governor may have had the power to appoint a special prosecutor before the 1998
6 Organic Act amendments organically establishing the Attorney General as "chief legal officer,"
7 and before the Guam Legislature passed P.L. No. 25-44 establishing the position as an elected
8 office, the Governor has no authority to usurp or invade the province of that office now. Not
9 unless Congress otherwise provides.
10

11 In *In re House of Representatives (Special Prosecutor)*, 575 A.2d 176 (R.I. 1990), the
12 Supreme Court of Rhode Island issued an advisory opinion to the House of Representatives on
13 the validity of proposed legislation that would have created a procedure for the appointment of a
14 special prosecutor to investigate and prosecute any crime involving certain public officials,
15 including the Governor; Lieutenant Governor; Secretary of State; Attorney General and any
16 assistant attorneys general; and persons serving as directors of departments within the executive
17 branch. The procedures envisioned that upon receipt of an application, the chief justice of the
18 Rhode Island Supreme Court would appoint a special prosecutor from among the members of
19 the Rhode Island bar and define the limits of the special prosecutor's jurisdiction.
20

21 The Rhode Island Supreme Court found the proposed law invalid as a violation of the
22 doctrine of separation of powers in two respects. First, the Court found the law would
23 compromise the independence of the judiciary by imposing administrative duties on the chief
24 justice that would effectively eliminate the chief justice from participating in any appeals
25 involving the special prosecutor. Pertinent to the case at bar, the Court also found that the

1 legislation would unconstitutionally interfere with the common law powers and duties of the
2 attorney general with respect to his authority to supervise and direct criminal investigations and
3 prosecutions. The decision in the case is directly on point:

4 **As a constitutional officer, the individual who holds the**
5 **office of Attorney General in this state is in a unique position**
6 **independent from the other branches of government.** In Rhode
7 Island the Attorney General is an elected official, who is different
8 from attorneys general in many other states and the Federal
9 government wherein the attorney general is appointed by the chief
10 executive officer. **There have been instances in which other**
11 **jurisdictions have invalidated the appointment of a special**
12 **prosecutor on the basis of the constitutional status of the**
13 **attorney general.** In *Murphy v. Yates*, 276 Md. 475, 494, 348
14 A.2d 837, 847 (1975), the court concluded that "the General
15 Assembly may not abrogate the common law powers of the
16 Attorney General of Maryland * * * having been constitutionally
17 stated as those 'prescribed by law.'" The court also reasoned, "If
18 an office is created by the Constitution * * * the position can
19 neither be abolished by statute nor reduced to impotence by the
20 transfer of duties characteristic of the office to another office
21 created by the legislature." *Id.* at 492, 348 A.2d at 846. *See also*
22 *Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority*, 98
23 Ill.2d 58, 74 Ill.Dec. 548, 456 N.E.2d 50 (1983).

24 **The core function of the constitutionally established**
25 **office of Attorney General is the power and discretion to**
26 **prosecute crimes. This court has held that the essential duty of**
27 **the Attorney General is that of "public prosecutor."** *Suitor v.*
28 *Nugent*, 98 R.I. 56, 58, 199 A.2d 722, 723 (1964). A key aspect of
29 the Attorney General's role as public prosecutor is the element of
30 discretion. **"It is well settled in this state that the Attorney**
31 **General is the only state official vested with prosecutorial**
32 **discretion."** *State v. Rollins*, 116 R.I. 528, 533, 359 A.2d 315,
33 318 (1976).

1 **The proposed legislation transfers full prosecutorial**
2 **authority to a special prosecutor appointed by a member of**
3 **the judicial branch of government. It is our opinion that this**
4 **transfer of power to the special prosecutor severely infringes**
 Accordingly, we find that the proposed legislation violates article
 IX, section 12, of the Rhode Island Constitution.

5 575 A.2d 179-80 (emphasis in bold added; editorial ellipsis in original).

6 In *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (Md. App. 1975), the Maryland Court
7 of Appeals held that an act creating the office of state prosecutor as an independent unit within
8 the executive branch was an unconstitutional invasion of the constitutionally recognized
9 common law powers and duties of the state's attorneys and Attorney General. The court first
10 held that the Maryland Legislature was without authority to limit the constitutional duties and
11 powers of the Attorney General. "It seems clear to us that from and after the adoption of the
12 Constitution of 1867, the General Assembly was without power to limit or modify the
13 constitutional duties of either the State's Attorneys or the Attorney General by transferring the
14 duties of either of these offices to another officer created by statute." *Id.*, 276 Md. 489, 348 A.
15 844. Later in the opinion, the Court held that the argument that the special prosecutor's powers
16 and duties were "concurrent" with the Attorney General and state's attorneys did not ameliorate
17 the fact that it was nevertheless an invasion of their constitutional offices.
18

19 We do not find persuasive the contention that the duties
20 imposed on the Special Prosecutor are concurrent with the powers
21 of the State's Attorneys. **The simple fact is that the Special**
22 **Prosecutor's power to initiate an investigation and to**
23 **commence prosecution if a State's Attorney does not act is a**
24 **clear invasion of the State's Attorney's most awesome**
25 **discretionary power: to determine whether or not to**
prosecute. Furthermore, the Special Prosecutor is empowered by
the Act to represent the State in any appeal or post conviction
proceeding resulting from his prosecutions. **Such power is an**
invasion on the constitutional duty imposed upon the Attorney
General. Moreover, in each instance the power is transferred

1 **from what has traditionally been an elected official to an**
2 **appointed official.** Praiseworthy though the purpose of the
3 General Assembly might have been in enacting the legislation, the
4 result can only be validly achieved by a constitutional
5 amendment.

6 *Id.*, 276 Md. 495, 348 A. 848 (emphasis in bold added). It is noteworthy that the
7 Maryland court was troubled by the Legislature's transfer of core prosecutorial functions from
8 an elected to an appointed official. In the case at bar, not only is the Governor's appointment
9 wholly unauthorized by the Organic Act or even local legislation (assuming the legislature were
10 authorized to enact such legislation by the Organic Act), it transfers those core prosecutorial
11 functions from an elected to an appointed officer. The Governor's appointment of a special
12 "prosecutor" is an affront to the intent of both Congress and the Legislature of Guam.

13 **CRITERIA FOR ISSUANCE OF A PRELIMINARY INJUNCTION**

14 In the Ninth Circuit, there are two tests for the issuance of preliminary injunctive relief, the
15 "traditional" test and an alternative test. "The traditional test for granting preliminary injunctive
16 relief requires the applicant to demonstrate: (1) a likelihood of success on the merits; (2) a
17 significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and
18 (4) whether any public interest favors granting an injunction." *Raich v. Ashcroft*, 352 F.3d 1222,
19 1227 (9th Cir. 2003) (citations omitted).

20 The alternative test for issuance of a preliminary injunction "requires the applicant to
21 demonstrate either: a combination of probable success on the merits and the possibility of
22 irreparable injury; or serious questions going to the merits and that the balance of hardships tips
23 sharply in the applicant's favor." *Raich v. Aschcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003).
24 "These two tests are not inconsistent. Rather, they represent a continuum of equitable discretion,
25 whereby 'the greater the relative hardship to the moving party, the less probability of success

1 must be shown.' *Nat'l Ctr. For Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir.
2 1984)." *Id.* "These two alternatives represent 'extremes of a single continuum,' rather than two
3 separate tests." *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810 (9th Cir.
4 2003); *accord*, *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004); *Earth Island Institute v. United*
5 *States Forest Service*, 351 F.3d 1291, 1297-98 (9th Cir. 2003); *Brown v. California Dept. of*
6 *Transportation*, 321 F.3d 1217, 1221 (9th Cir. 2003); *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032,
7 1038 (9th Cir. 2003). Under either test, a preliminary injunction is due to be issued.

8 THE TRADITIONAL TEST

9
10 **Because the Office of Special Prosecutor is Not Authorized by the Organic Act or**
11 **Otherwise, and the Governor Therefore Has No Authority to Appoint a Special**
12 **Prosecutor, there is a Significant Likelihood of Success on the Merits**

13 There is no authority for the Governor's actions, either in federal law under the Organic
14 Act or in Guam law, making declaratory and injunctive relief and *quo warranto* particularly
15 appropriate. Historical practice aside, nothing in the present Organic Act as amended permits
16 the exercise of any such authority. In short, the Governor's actions rest on no statute, federal or
17 local. They are wholly without legal authority, *ultra vires*. The Governor's actions are a blatant
18 violation of the doctrine of separation of powers as set forth in the Organic Act itself. The
19 absence of authority for the Governor's actions and the violation of the separation of powers
20 makes likelihood of success on the merits and judgment for the plaintiff not merely significant,
21 but inevitable.

**There Exists a Significant Threat of Irreparable Injury
if the Injunction is Not Issued**

In certain cases, particularly where a significant likelihood of success on the merits is shown, irreparable injury is presumed.³ Even without a presumption of injury, the threat of irreparable injury in the case at bar is easily demonstrated. The Attorney General cannot perform his duties as chief legal officer responsible for the enforcement of Guam's laws in the shadow of an unlawfully appointed and constitutionally unauthorized "special prosecutor" (who responds only to the Governor and to the Governor alone) to investigate and countermand or usurp the prosecutorial discretion of the Attorney General. The Governor is attempting to exercise powers Congress expressly took away from him, that is, supervision and control of the Office of Attorney General. There is no longer any authority in the Organic Act or elsewhere for the creation by the Governor of the office of "special prosecutor," and his argument that 48 U.S.C. § 1422 authorizes him to do so because he is "responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam," is simply unavailing. The Governor has no business investigating or overseeing the prosecution of alleged criminal wrongdoing. Absent Congressional authorization, the Governor's actions complained of here not only invade the province of the Attorney General to investigate and prosecute criminal wrongdoing, a responsibility now reserved exclusively to the Office of the Attorney General by Congress, but also invade the province of the local legislature to even establish such an office in the first place (assuming, of course, that the Legislature of Guam was itself authorized under the

³ See *Miller v. California Pacific Medical Center*, 19 F.3d 449, 460 (9th Cir. 1994) ("if the Board demonstrates that it is likely to prevail on the merits, we presume irreparable injury"). In *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, (9th Cir. 1987), the court held that in statutory enforcement actions brought by the government irreparable injury to the government had to be presumed. That holding dovetails perfectly with the fact that in *quo warranto* actions, the burden of proof is reversed, and it is the defendant who must prove by what right he holds office, not the government to prove the office is being usurped. See again, *State ex rel. Carter v. Stevens*, 29 Or. 464, 472, 44 P. 898, 899.

1 Organic Act to create such an office and endow it with duties and powers otherwise reserved at
2 common law to the Attorney General). What the facts of this case present is the creation of a
3 “special prosecutor” beholden only the political whims and caprices of the Governor, in no
4 ways answerable to the electorate. That is not what Congress had in mind in insulating the
5 Office of the Attorney General from political influence in the Organic Act, nor is it what the
6 local Legislature envisioned in making the Attorney General an elected office.

7
8 The essential role of the Attorney General, relative to other constitutional offices, if the
9 Governor is not enjoined, would be radically transformed from that envisioned by Congress. In
10 effect, the Governor would be become a super-Attorney General, within unfettered discretion to
11 usurp the constitutional or Organic Act authority of the Attorney General as intended by
12 Congress.

13 The independence of the Attorney General is critical to the integrity of law enforcement
14 and prosecution services that the people of Guam have come to expect from the designated
15 elected Attorney General. It is for the Attorney General to reconcile the interests of individual
16 government officials with the interests of the Territory and of the people. Sometimes this
17 responsibility requires the Attorney General to take positions to which individual officials or
18 agencies object. To permit these officials, even the Governor, to displace the Attorney
19 General’s determination of what best serves the public interest is to tear down the edifice of
20 independence built by the 1998 Congressional Amendments.
21
22
23
24
25

The Balance of Hardships Favors the Applicant

The danger to the very essence of the Office of Attorney General as envisioned in the Organic Act cannot be underestimated. An injunction works no hardship upon the Governor at all. His power to manage and supervise the Executive Branch remains the same. All that he may lose should the injunction issue is the power to usurp the powers and duties of the Attorney General, a power he never had to begin with, at least, not since the 1998 amendments to the Organic Act and the 199 amendments to local law.

The Public Interest Favors Granting an Injunction

The Governor's actions completely undermine the role accorded the Attorney General by the people of Guam, by the Legislature of Guam, and by the Congress. There is nothing more detrimental for public – a public that insists upon objective, independent enforcement of the rule of law – than to have the creation of a legally unauthorized law officer to oversee, harass and usurp the Attorney General it elected. What disserves the public interest most would be to permit the Governor to continue to violate the Organic Act. To preserve the public interest requires that the creation of such an office without authority in the law, and the appointment of anyone to fill that office, must be enjoined.

THE ALTERNATIVE TEST

As noted previously, the alternative test for issuance of a preliminary injunction in the 9th Circuit “requires the applicant to demonstrate either: a combination of probable success on the merits and the possibility of irreparable injury; or serious questions going to the merits and that the balance of hardships tips sharply in the applicant’s favor.” *Raich v. Aschcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003).

1 With respect to the first alternative, the likelihood of probable success and the possibility
2 of irreparable injury have clearly been demonstrated. The Governor has no authority to appoint
3 anyone to the office of "special prosecutor," because the office does not exist, nor is it
4 authorized under the Organic Act. In order for the Governor to appoint someone to the position,
5 he would have to, in essence, legislate the office into existence by himself, an obvious violation
6 of the doctrine of separation of powers. Moreover, even if the office had been established by the
7 Guam Legislature, which it has not, it would literally take "an act of Congress" for the
8 Governor to get over the constitutional hurdle imposed by the 1998 amendments to the Organic
9 Act establishing the Attorney General as chief legal officer for the government of Guam,
10 because the Governor's attempted appointment of anyone to the position of "special prosecutor"
11 is an unlawful and inorganic usurpation of the powers and duties of the Office of Attorney
12 General. And the possibility of irreparable injury, as discussed earlier, is presumed where, as
13 here, the Governor is violating Guam's constitution in his usurpation of the role and function of
14 the Attorney General.
15

16 Similarly with respect the second part of the alternative test – serious questions going to
17 the merits and that the balance of hardships tips sharply in the applicant's favor – a preliminary
18 injunction is clearly warranted. The questions presented here on the merits are, indeed, very
19 serious, for those questions go to the very heart of Congressional intent in the Organic Act with
20 respect to the separation and distribution of powers and duties in the Territorial Government of
21 Guam. As demonstrated previously, the Governor will suffer no hardship, for he cannot suffer
22 the loss of a power he did not have to begin with; but the hardship to the Office of the Attorney
23 General, and to the people of Guam who elected him, is quite severe, and will result in a return
24 to the days of political cronyism devoid of independent prosecutorial discretion and judgment.
25

1 That is not what Congress intended in organically establishing the Office as “chief legal officer
2 for the government of Guam,” nor is it what the Guam Legislature intended in making the
3 Office an elected position. Accordingly, under the alternative test, a preliminary injunction is
4 due to be issued.

5 CONCLUSION

6 The establishment of the Attorney General in the Organic Act by Congress as a
7 “constitutional” or “organic” officer, and the Legislature of Guam’s decision that the position be
8 elected, were intended to protect against the very thing the Governor has stated he intends to do,
9 namely: attempt to seize control of the Office of Attorney General by appointing a super-
10 Attorney General to harass him and undermine his efforts. But it was the intent of Congress and
11 the Legislature of Guam to insulate the Attorney General from politics so that the enforcement
12 of law is responsive to the public directly, not to the political whims of other government
13 officials.
14

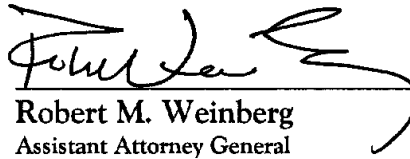
15 Based upon the foregoing, plaintiff respectfully submits that a preliminary injunction is
16 due to be issued as follows:

17 an injunction enjoining the Governor, his successors, agents, employees, and all
18 persons acting in concert with him from exercising or attempting to exercise any of
19 the powers and duties of the Office of Attorney General by, *inter alia*, exercising any
20 authority with respect to the investigation and/or prosecution of suspected crimes
21 or criminal activity within the Territory of Guam, said authority being entirely
22 within the powers and duties exclusively reserved to the Attorney General as Chief
23 Legal Officer; or by appointing or attempting to appoint a “special prosecutor,”
24
25

1 however denominated, to investigate and prosecute allegations of criminal
2 wrongdoing within the Territory of Guam.

3 Respectfully submitted this 14th day of July, 2004.

4 OFFICE OF THE ATTORNEY GENERAL
5 DOUGLAS B. MOYLAN, Attorney General of Guam

6 
7 Robert M. Weinberg
8 Assistant Attorney General

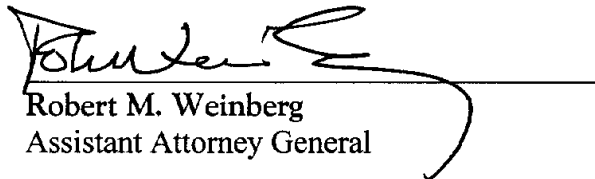
1 **CERTIFICATE OF SERVICE**

2 This is to certify that I have this day served opposing counsel with a copy of the
3 foregoing by hand delivery, or by depositing same in the United States Mail, postage
4 prepaid, and properly addressed to:

5 Shannon Taitano, Esq.
6 Legal Counsel, Governor's Office
7 P.O. Box 2950
8 Hagåtña, Guam 96932

9 this 14th day of July, 2004.

10 **OFFICE OF THE ATTORNEY GENERAL**
11 **DOUGLAS B. MOYLAN, Attorney General of Guam**

12 
13 Robert M. Weinberg
14 Assistant Attorney General